

No. 89-722

Supreme Court, U.S.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1989

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BRADLEY DAVID THOMAS, PETITIONER

v.

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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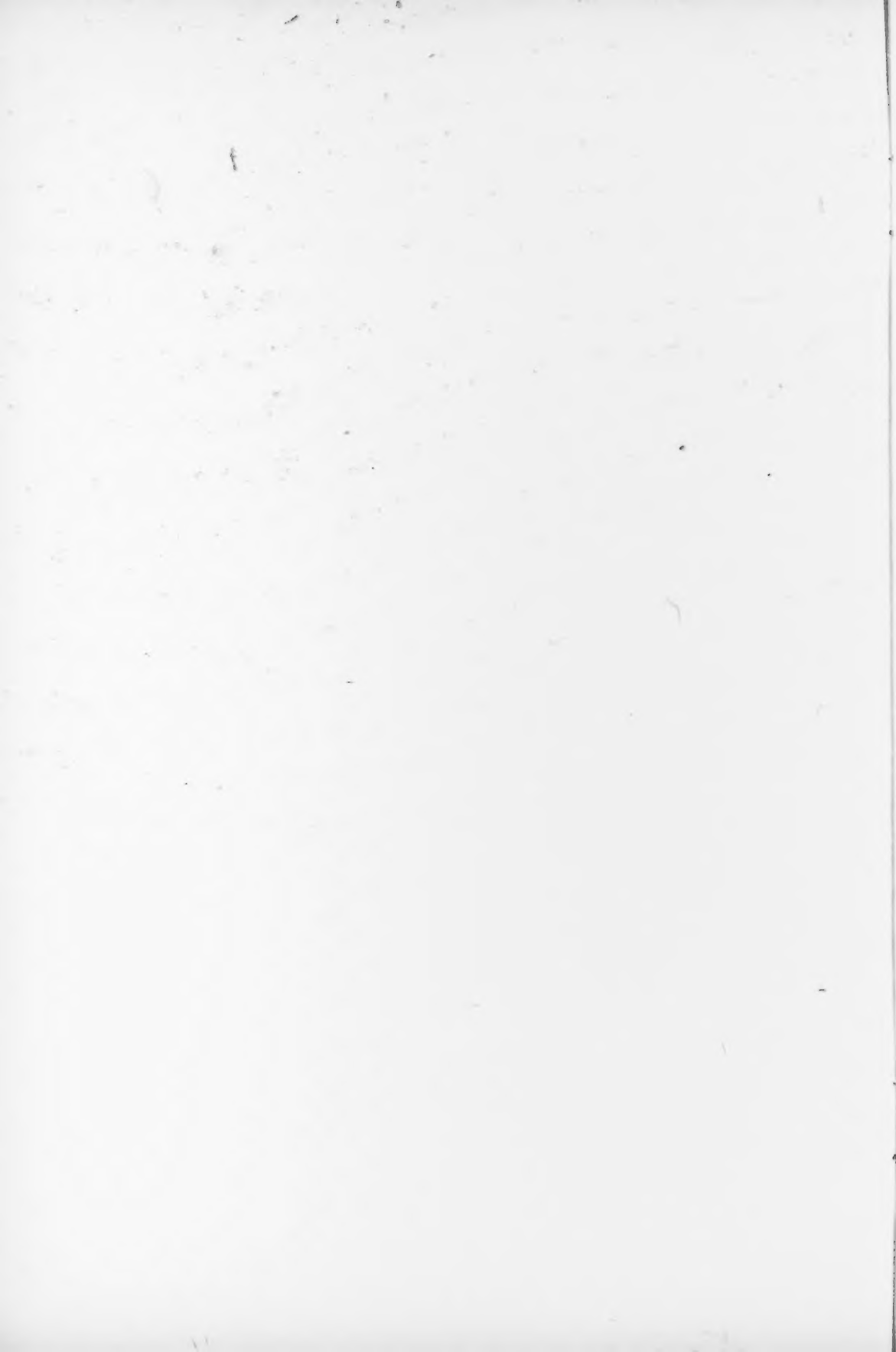
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### **QUESTION PRESENTED**

**Whether the district court abused its discretion by denying a motion for a bill of particulars seeking the names of 15 "known individuals" mentioned in the indictment.**



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## **OPINION BELOW**

The opinion of the court of appeals (Pet. App. 1-45) is reported at 877 F.2d 281.

## **JURISDICTION**

The judgment of the court of appeals was entered on June 8, 1989. A petition for rehearing was denied on September 1, 1989 (Pet. App. 46-47). The petition for a writ of certiorari was filed on October 31, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## **STATEMENT**

A 108-count indictment returned in the United States District Court for the Northern District of West Virginia

charged petitioner and three other men with various drug-related offenses. Following a three-week jury trial, petitioner was convicted of conducting, and conspiring to conduct, an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c) and (d); conspiring to distribute and possess with intent to distribute cocaine, in violation of 21 U.S.C. 846; engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848; eight counts of distribution of cocaine, in violation of 21 U.S.C. 841(a)(1); 17 counts of interstate travel in aid of a racketeering enterprise, in violation of 18 U.S.C. 1952(a)(3); and two counts of evading taxes, in violation of 26 U.S.C. 7201. Petitioner was sentenced to a total of 30 years' imprisonment and to a special parole term of ten years. He was fined \$500,000. The court also entered a judgment of forfeiture with respect to certain vehicles and property that petitioner and his co-defendants had used to distribute drugs, pursuant to 18 U.S.C. 1962. The court of appeals affirmed the convictions on all counts except for the conspiracy conviction, which it set aside on the ground that Congress did not intend that an individual be punished both for conspiracy and for the operation of a continuing criminal enterprise.

The evidence, the sufficiency of which is not disputed, showed that petitioner was the "ringleader" of an organization engaged in the large-scale importation and distribution of marijuana and cocaine. Pet. App. 2-3. Petitioner arranged to have the drugs smuggled into Florida, primarily from the Bahamas and Jamaica. The drugs were then distributed in the Ohio valley and in Wheeling, West Virginia. The three co-defendants named in the indictment included a major distributor, an overseer of petitioner's "safehouses," and the courier who transported money and drugs between Florida and the Ohio valley. *Id.* at 3.

The indictment also referred to 15 "known individuals." The grand jury drafted the indictment in that manner to

protect persons who had provided information because of the history of violence and threats associated with the organization. See Gov't C.A. Br. 5. The defendants filed a motion for a bill of particulars seeking the names of the "known individuals," but the district court denied the motion. Each of the "known individuals" testified at trial. The court of appeals found no error in the denial of the motion for a bill of particulars, noting "the absence of any showing of unfair surprise." Pet. App. 42.

### ARGUMENT

The decision to grant or deny a bill of particulars rests in the discretion of the district court. *Wong Tai v. United States*, 273 U.S. 77, 82 (1927). The functions of the bill of particulars are to allow the defendant to understand the charges in order to prepare a defense, to minimize surprise at trial, and to protect against double jeopardy. *United States v. Paiva*, No. 88-2041 (1st Cir. Dec. 21, 1989), slip op. 12. But the government is not required to divulge the identity of its witnesses in a noncapital case, see *United States v. DiPasquale*, 740 F.2d 1282, 1294 (3d Cir.), cert. denied, 469 U.S. 1228 (1984), and a defendant does not obtain a right to a list of witnesses by making his request in a motion for a bill of particulars, *United States v. Anderson*, 799 F.2d 1438, 1442 (11th Cir. 1986), cert. denied, 480 U.S. 931 (1987). In cases where a motion for a bill of particulars is denied, reversal is mandated only where the defendant shows that he was actually surprised at trial and prejudiced in his substantial rights. *United States v. Hughes*, 817 F.2d 268, 272 (5th Cir.), cert. denied, 484 U.S. 858 (1987).

The court of appeals correctly concluded that the district court did not abuse its discretion in this case. In his petition for a writ of certiorari, petitioner claims prejudice



primarily because 21 U.S.C. 848(d)(2)(A) (Supp. V 1987) requires proof that the operator of a continuing criminal enterprise acted in concert with five or more persons. Pet. 9-10. However, there is no special requirement that the government identify the participants in a continuing criminal enterprise; an indictment charging the operation of a continuing criminal enterprise is sufficient if it tracks the language of the statute. *United States v. Burt*, 765 F.2d 1364, 1367 (9th Cir. 1985); *United States v. Amend*, 791 F.2d 1120, 1125 (4th Cir.), cert. denied, 479 U.S. 930 (1986). Moreover, there is no basis for the contention that petitioner was surprised at trial by the identities of the persons who were alleged to have participated in his drug distribution enterprise. Three persons were indicted with petitioner, and during voir dire the trial court read a list of all of the witnesses the government intended to call, which included 13 of the 15 "known individuals."

Contrary to petitioner's contention (Pet. 14), there is no conflict among the circuits on the question presented. In fact, the government prevailed in each of the four appellate cases petitioner cites — *United States v. Cole*, 755 F.2d 748, 760 (11th Cir. 1985); *United States v. Anderson*, *supra*; *United States v. Barbieri*, 614 F.2d 715, 719-720 (10th Cir. 1980); and *United States v. Barrentine*, 591 F.2d 1069, 1075-1081 (5th Cir.), cert. denied, 444 U.S. 990 (1979). Nor is the decision below inconsistent with the statement in *Will v. United States*, 389 U.S. 90, 99 (1967), that it is not uncommon for trial courts to require the government to disclose the names of its witnesses prior to trial. The names of the witnesses were not disclosed here until voir dire because of unusual circumstances—the need to protect them, which constituted a valid ground for the prosecutor to refuse to reveal the identity of the government's witnesses

in advance of trial. See *Government of the Virgin Islands v. Martinez*, 847 F.2d 125, 128 (3d Cir. 1988).

### CONCLUSION

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

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